INDEX

CITATIONS

STATE STATUTES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-862

UNITED AIR LINES, INC.,

Appellants,

vs.

GEORGE E. MAHIN, et al.,

Appellees.

On Appeal From The Supreme Court of Illinois

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the Supreme Court of Illinois in *United Air Lines, Inc.* v. *Mahin, et al*, is reported at 49 Ill. 2d 45, 273 N.E. 2d 585 (1971) and is reproduced in the Appendix at page 193. The unreported opinion of the trial court, the Circuit Court of Cook County, is set out in the Appendix at page 185.

JURISDICTION

The judgment of the Supreme Court of Illinois in *United Air Lines, Inc.* v. *Mahin, et al., supra,* was entered on April 1, 1971, and a timely petition for rehearing was denied by the same court on October 4, 1971. The notice of appeal was filed in the Supreme Court of Illinois on December 20, 1971. The appellant's Jurisdictional Statement was filed in this Court on January 3, 1972, claiming that this Court had jurisdiction to review on appeal the aforementioned judgment of the Supreme Court of Illinois pursuant to Title 28, United States Code, Section 1257(2). This Court noted probable jurisdiction on March 20, 1972.

CONSTITUTIONAL PROVISIONS

Article I, Section 8, clause 3 of the United States Constitution provides, in pertinent part:

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, . . ."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

Illinois Revised Statutes, 1961-1971, Ch. 120, §§ 349.1, 439.2 and 439.3.

USE TAX ACT

AN ACT in relation to a tax upon the privilege of using tangible personal property in this State. Approved July 14, 1955, L. 1955, p. 2027; title as amended by act approved July 8, 1959. L. 1959, p. 654.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

439.1 Title.] § 1. This Act shall be known and may be cited as the "Use Tax Act".

439.2 Definitions.] § 2. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it does not include

493.3 Tangible personal property purchased at retail — Use tax — Rate — Collection and remittance —Exemptions.] § 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer. Such tax is at the rate of 4¼% of the selling price of such property if purchased prior to October 1, 1969, and at the rate of 4% of the selling price of such property if purchased after September 30, 1969.

* * *

To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:

(a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by such individ-

ual for his or her own use while temporarily within this State or while passing through this State;

(b) the use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property to interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by such interstate carriers for-hire;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other State;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

QUESTION PRESENTED FOR REVIEW

Is the imposition of the Illinois Use Tax upon an interstate air carrier's local activity of storage and withdrawal of aviation fuel measured by the volume of fuel that is withdrawn from storage and placed in the tanks of its aircraft violative of the Commerce Clause as set forth in Article I, Section 8, clause 3 of the United States Constitution and Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

United Air Lines, Inc.[1] is doing business in Illinois. Primarily, it carries passengers and freight in interstate commerce to and from Chicago via O'Hare and Midway Airports. (A. 2, 56, 57; R. 039, 033). United purchases turbine fuel and aviation gas for its O'Hare and Midway operations from Shell Oil Co.,[2] pursuant to a general requirements contract. (R. 301). Since approximately 1953, Shell has delivered turbine fuel and aviation gas[3] to United by the following procedure.

Shell transports crude oil primarily from West Texas and Oklahoma to Wood River, Illinois, for processing and refining. (A. 128, 148-49; R. 212, 274-75). At Wood River, Shell produces turbine fuel. (A. 128, 148, 149; R. 212, 274-75). In addition to refining turbine fuel in Illinois, Shell barges already refined turbine fuel from Houston,

---

1. United Air Lines, Inc. is incorporated in Delaware, has its principal place of business in Cook County, Illinois, and is qualified to do and is doing business in Illinois.

2. Shell Oil Co. is incorporated in Delaware, designates its principal place of business as New York City, and is qualified to do and is doing business in the State of Illinois.

3. United purchases basically two types of aviation fuel from Shell. Turbine fuel, which is essentially kerosene, fires its jet planes, and 100 octane aviation gas propels its piston engine aircraft. (A. 139, R. 235). Of the two types of fuel purchased by United from Shell per month, aviation gas equals only 3-4% of the volume of turbine fuel. (R. 237). Although not explicitly established, the record supports the inference that the initial production and distribution of aviation gas by Shell to United is similar to that for turbine fuel. (A. 139; R. 235, 301).

Texas, or Norca, Louisiana, up the Mississippi River to Wood River, where it is stored until it may be simultaneously piped with the Wood River refined turbine fuel to East Chicago, Indiana. (A. 137-38, 147-50; R. 231-32, 268-69, 274-76). From Wood River, Shell transports its turbine fuel 250 miles through its own pipe lines to Shell storage facilities in East Chicago, Indiana. (A. 128, 148-49; R. 212-13, 274-75). No further processing or refining occurs at Shell's facilities in East Chicago, Indiana, merely filtering necessitated by the pipe line transfer. (A. 145-46; R. 259). The fuel remains in storage at East Chicago approximately 10-12 days (A. 129, 137; R. 213, 231) until requested for delivery by United. United has no employees at Shell's facilities in East Chicago. (A. 129, 163-64; R. 213, 323).

Generally once a month, United, through its agents, Lockheed Air Terminal and Butler Aviation, orders aviation fuel from Shell at East Chicago for delivery approximately three times the following month at O'Hare and Midway Air Terminals. (A. 129-30, 139-40; R. 213-14; 235-36). Lockheed Air Terminal acts as United's agent at O'Hare and Butler Aviation acts as agent for United at Midway. Aviation gas for United's operations at O'Hare and Midway is orally ordered from Shell by phone by Lockheed and Butler, respectively, and arranged for shipment by the same from East Chicago-Hammond on common carrier trucks owned by Rogers Trucking Co. (A. 138-39, 143-44, 157-60; R. 234-35, 254, 303-04, 306). This gas is stored at both O'Hare and Midway until needed for United's interstate and intrastate flights. (A. 174; R. 300-01, 350-51). Requests for turbine fuel from Midway and O'Hare by United's agents are generally in writing and sent to East Chicago on the 10th of each month. (A. 129-30, 157-58; R. 213-14, 303). Turbine fuel for Midway is

trucked by United via Rogers Cartage Company from East Chicago, and stored at Midway until needed for aircraft propulsion. (A. 145, 159-60, 174-75; R. 258, 306-07, 351).[4]

The delivery of turbine fuel for United's operations at O'Hare, the largest of United's operations, is somewhat more intricate. As noted previously, generally once a month, United's agent at O'Hare, Lockheed Air Terminal, will request, in writing, from Shell's storage facilities at East Chicago, turbine fuel for the following month's supply. Lockheed directs Shell at East Chicago to deliver the requested turbine fuel designed for O'Hare to the West Shore Pipe Line Fuel Company, a common carrier, at the connecting station between Shell and West Shore in Hammond, Indiana. (A. 130-31, 158-59, 179; R. 216, 238, 304, 363). Shell owns 20% of West Shore Pipe Line. (A. 131; R. 216-17). The turbine fuel is then shipped via the West Shore Pipe Line to storage facilities located in Des Plaines, Illinois, and owned by Shell, but leased by United. (A. 132-33; 140-41; R. 218-19; 243).[5] Lockheed Air Terminal manages the storage facilities at Des Plaines on a through-put basis; and, unless otherwise agreed by Shell, United

---

4. Apparently neither Shell nor United takes an insurable interest in the turbine fuel and aviation gas shipped from East Chicago via Rogers Cartage Co. ultimately destined for United. (A. 132, 136, 158, 165, 168; R. 218, 225, 300, 301, 304, 327, 328, 332).

5. Shell's invoices for the turbine fuel going to O'Hare are based on the receiving meters of West Shore Pipeline at Hammond, Indiana. (A. 179; R. 363). The billing for the fuel is sent by Shell from Indianapolis, Indiana to United at Des Plaines, Illinois. United sends the payment for the fuel to Indianapolis, Indiana. (A. 131, 182; R. 217, 369).

must store Shell fuel at Des Plaines.[6] (A. 140, 146-47; R. 241-42, 243, 264-65). United shares its leased facilities at Des Plaines with American Airlines, who also orders turbine fuel from Shell at East Chicago for ultimate use at O'Hare airport. United's and American's fuel is commingled in storage at Des Plaines while awaiting transfer to O'Hare for its ultimate use. (A. 132-33, 135-36, 142-43; R. 219, 225, 247). The fuel stored at Des Plaines is subject to no further refining or processing except for the process of filtering necessitated by the pipeline transfer from East Chicago (A. 141, 168-69; R. 245, 333-34). From the storage facilities at Des Plaines, the turbine fuel is transferred to storage facilities at O'Hare by pipeline owned by Shell and leased to United and American Airlines. (A. 142-43, 168-69; R. 246, 333-34). At O'Hare Airport,[7] the turbine fuel flows into the primary tank farm area where the fuel is filtered once again. From the primary tank area, the fuel is piped to several satellite areas from which the fuel is either piped into refueler trucks for fueling aircraft, or piped directly through the hydrant systems onto the air craft. (A. 168-71; R. 333-41). All aviation fuel that is ultimately pumped onto United's aircraft at either O'Hare or Midway Airports and that is subject to the present litigation is either refined and/or stored by Shell at Wood River, Illinois, prior to its transfer by Shell to Shell's storage facilities at East Chicago, Indiana. (A. 147-49, 153-55, 156-57; R. 268-69, 274-75, 289-90, 292, 297-98, 300-01).

---

6. United is self-insured on the fuel stored at Des Plaines, Illinois. (A. 165, 168; R. 327-28, 332).

7. O'Hare Airport is owned by the City of Chicago and the city leases its facilities at O'Hare to United and approximately fourteen other signatory airlines. (A. 169; R. 334).

From approximately August of 1955 until June 3, 1963, United paid to the State of Illinois without protest a use tax[8] on the aforementioned fuel purchase, delivery, and storage to the following extent:

"(a) On all fuel consumed on flights originating within and terminating within Illinois (intra-state operations), and

(b) On a portion of the fuel deemed to have been used and consumed (burned off) in Illinois on flights departing from Midway and O'Hare to points outside Illinois.

* * *

(Plaintiff's Amended Complaint in Chancery — A. 1; R. 047).

Then, as now, the use tax was imposed upon the privilege of using in Illinois tangible personal property purchased at retail;[9] use being defined as the "exercise by any person of any right or power over tangible personal property incident to the ownership of that property . . ."[10] However, the Use Tax Act includes the following provision:

> To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:
>
> (a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;
>
> (b) the use, in this State, of tangible personal property which is acquired outside this State, and which is

8. Ill. Rev. Stat. 1955-1963, Ch. 120, §§439.1, et seq.
9. Ill. Rev. Stat. 1955-1963, Ch. 120, §439.3.
10. Ill. Rev. Stat. 1955-1963, Ch. 120, §439.2.

moved into this State for use as rolling stock moving in interstate commerce;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

(Ill. Rev. Stat. 1955-1963, ch. 120, § 493.3, unnumbered paragraph 6)

From 1955 through June 3, 1963, the temporary storage exception noted in sub-section (d) above was construed by the Illinois Department of Revenue to impose a use tax on fuel temporarily stored in Illinois only to the extent it was actually consumed or burned in or over Illinois. However, on June 3, 1963, due to its belief that it had been misapplying the temporary storage exception in sub-section (d) (A. 121-22; R. 190-91), the Department of Revenue issued a Bulletin that provided in pertinent part:

"... temporary storage ends and a taxable use occurs when the fuel is taken out of storage and placed into the tanks of the airplanes, railroad engine or truck. At this point the fuel is converted into its ultimate use, and, therefore a taxable use occurs in Illinois. If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois, but always puts it into the tank of the air-

> plane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the use tax to their supplier."[11]

> *United Air Lines, Inc.* v. *Mahin, et al.*, 49 Ill. 2d 45, 48-49; 273 N.E. 2d 585, 586-87 (1971).

On September 25, 1963, United filed its Amended Complaint in Chancery in the Circuit Court of Cook County claiming that the imposition of the use tax on the placing or loading of the fuel into the tanks of aircraft departing on interstate journeys would be violative of the Commerce and Due Process clauses of the Constitution of the United States. In the alternative, United alleged that only that portion of the Illinois-laden fuel actually burned within the State by the departing aircraft could be constitutionally subjected to a state use tax. (A. 1-17; R. 038-058).

Prior to trial, the parties stipulated that all aviation fuel subject to the pending litigation:

> ". . . is purchased by United from Shell Oil Company, and is delivered to United, with possession, title and all risk of loss passing to United, either at Hammond, Indiana or at East Chicago, Indiana.
>
> All such fuel is thereafter transported by pipeline or tank trucks, by common carriers under contract to United, normally on a daily basis, to ground fuel storage facilities located within Illinois, on or near O'Hare or Midway Airports in Chicago, where it is stored prior to being transferred to the fuel storage tanks of aircraft. The period of storage in such ground fuel storage facilities ranges from a minimum of two days (during which period jet fuel is processed to

---

11. The validity of requiring Shell to collect the tax is not in issue before this Court. (A. 5; R. 043).

> eliminate impurities) to a maximum of twelve days. The average period of storage ranges, depending on the type of fuel and storage facilities involved, from two and a half to six days." (A. 38; R. 104).

However, the parties further stipulated and agreed that all of the parties hereto shall have the right to offer additional evidence on any matter relevant to the subject matter of this litigation. (A. 45; R. 147).

On February 14, 1968, the trial court entered an order enjoining the Department of Revenue from imposing or collecting "a use tax upon any fuel loaded into plaintiff's aircraft in Illinois during the period prior to July 1, 1963." (A. 47; R. 151-52). The State did not appeal this order. On December 23, 1968, the trial court entered an order in favor of the Department of Revenue and other defendants and directed United in the event of an appeal, to continue payment of its use tax liability into the protest fund established for them pending the final determination of this litigation.[12] (A. 189-90).

On appeal, a majority of the Supreme Court of Illinois upheld the validity of the use tax as applied to United and interpreted the temporary storage provision of the statute by concluding:

> "To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would

---

12. Approximately 8 million dollars is presently being held in the protest fund, representing the tax liability of United to the State of Illinois from 1963 to the present.

be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution." (A. 202).

SUMMARY OF ARGUMENT

The storage and withdrawal of fuel by United Airlines under the present facts is a local taxable event supporting a non-discriminatory state use tax.

When the Illinois Use Tax is based upon the taxable event of storage and withdrawal, or, storage, withdrawal from storage and installation, the state tax is levied upon a substantial local activity that should bear its fair share of local government costs.

The imposition of the Illinois Use Tax upon United's local activities of storage and withdrawal, or storage, withdrawal from storage and installation, does not discriminate against interstate commerce by either (1) imposing the tax solely upon interstate enterprises, or (2) levying the tax upon interstate commerce at a higher rate, or (3) subjecting interstate commerce to the danger of "multiple tax burdens."

Since the facts reveal that the purchase of the aviation fuel in question by United Airlines from Shell Oil Company is basically an Illinois sale to an Illinois buyer that would support a sales tax upon the purchaser, the imposition of the present non-discriminatory use tax upon United (purchaser) is valid.

ARGUMENT

I.

THE STORAGE AND WITHDRAWAL OF FUEL BY UNITED AIRLINES UNDER THE PRESENT FACTS IS A LOCAL TAXABLE EVENT SUPPORTING A NON-DISCRIMINATORY STATE USE TAX.[13]

"While it is true that a State may not erect a wall around its borders preventing commerce an entry, it

---

13. A brief analysis of the genesis of the state use and storage and withdrawal taxes provides an interesting perspective of the historical maneuvers between interstate commerce and state taxation. At an early point in commerce clause development, it was established that a state could not tax property in interstate transit. And until about 1940, it was generally accepted that an interstate sales transaction was similarly immune from state taxation. Couple the two former principles with the teachings of Helson v. Kentucky, 279 U.S. 245 (1928), which exempted from state taxation the use of articles consumed in interstate transportation, and there existed the opportunity for interstate businesses to avoid local taxation by manipulating purchases of goods so as to constitute interstate sales. Apparently, this happened. Large enterprises doing business in interstate commerce would purchase goods through an interstate sale and have the goods delivered to their state of use where the goods would be stored and withdrawn as needed for utilization in interstate commerce. In this manner, the interstate enterprises became both a purchaser in interstate commerce as well as an ultimate user of goods in interstate commerce and, at one point, enjoyed substantial freedom from state taxation. The aforementioned practice gave birth to the state use and storage and withdrawal taxes, with the intention of removing the tax immunity from goods halted for storage purposes between two segments of interstate com-

is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State."

Northwestern States Portland Cement Co. v *Minnesota,* 358 U.S. 450, 461-62 (1959).

A.

When The Illinois Use Tax Is Based Upon The Taxable Event Of Storage And Withdrawal, Or Storage, Withdrawal From Storage and Installation, The State Tax Is Levied Upon A Substantial Local Activity That Should Bear Its Fair Share of Local Government Costs.[14]

This Court has "handed down [over] three hundred full dress opinions" dealing with the constitutionality of state tax measures when challenged pursuant to the Due

---

merce. *See,* Warren and Schleslinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way,* 38 Colum. L. Rev. 49, 55 (1938); Hartman, *Sales Taxation In Interstate Commerce,* 9 Vand. L. Rev. 138, 161 (1956).

As of 1969, 45 states have enacted some form of use tax. *The Compensating Use Tax and Its Effect on Multistate Business.* 20 Case W. Res. L. Rev. 597, 599 (1969).

14. Foreign corporations may utilize many economic factors available within a State including (1) labor supply; (2) conveniences of the local market; (3) buildings and other property; (4) power; (5) transportation facilities; (6) financial aid; (7) applicability of home management; (8) raw materials; and (9) the local public services, such as education, roads, and police and fire protection. See Sufrin, *Tax Incentives and Industrial Location,* 10 Syracuse L. Rev. 21 (1959).

Process or Commerce clause,[15] producing what this Court itself has described as a "quagmire" of decisions that have not "always [been] clear . . . consistent or reconcilable." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457-58 (1959). However, from this voluminous and complex litigation some general principles apparently remain unquestioned.

Although at one time a sharp controversy existed concerning whether the Commerce Clause of its own force impliedly prohibited state regulation or taxation of interstate commerce, or whether the states were free to regulate and tax interstate commerce unless explicitly precluded by

---

15. "The need for national economic unity unaffected by state borders and untrammeled by discriminatory and retaliatory state action against commerce from sister states was one of the chief reasons for abandoning the Articles of Confederation and adopting our federal constitution which entrusted Congress with the power to regulate interstate commerce. Two chief weaknesses of the Articles of Confederation were said to be the absence of power in Congress to regulate foreign and interstate commerce, and the presence of power in the states to do so. The almost catastrophic results flowing from this unfortunate situation were harmful reprisals and trade wars at home among the states, as well as the utter inability of the states to present a united front to foreign nations. The necessity for remedying these weaknesses, if the young Republic was to survive as a nation, appears to have been the primary reason for abandoning the Confederation and forming the Constitution. The dismal experience under the Confederation served to unite the members of the Constitutional Convention in the conviction that some branch of the federal government should possess the power to regulate commerce among the states and with foreign nations."

Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*. 46 VA. L. REV. 1053-54 (1960).

congressional action,[16] today it appears an established doctrine that the Commerce Clause of its own force is a limitation on the states' power to regulate or tax interstate commerce, and the failure of Congress "to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the State[s]." *Northwestern States Portland Cement Co., supra,* at 427. In deference to the aforementioned, it has been clearly articulated that a state may not tax the "privilege" of engaging in interstate commerce, *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951),[17] or allow "one single tax worth of direct interference with the free flow of commerce." *Freeman* v. *Hewitt,* 329 U.S. 249, 256 (1946). Nor may a State impose a tax which discriminates against interstate commerce either by exempting local goods from the tax leaving only interstate business subject to the imposition, *I. M. Darnell & Son Co.* v. *City of Memphis,* 208 U.S. 113 (1908);

---

16. *Compare* Brown v. Maryland, 25 U.S. (12 Wheat) 419, 449 (1827) (Marshall, J.) *with* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (Curtis, J.) *and* the foregoing *with* Welton v. Missouri, 91 U.S. 275, 282 (1875); Philadelphia & So. S.S. Co. v. Pennsylvania, 122 U.S. 326, 336 (1887); Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 492-93 (1887).

17. *Accord,* Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); and Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925). Although the state tax in each of these cases appeared to be fairly measured relative to the taxpayer's business connections within the taxing state, it was void as a privilege tax. *See also,* Roeskin, *The Impact of the Spector Decision,* 29 Taxes 523.

Walling v. *Michigan*, 116 U.S. 446 (1886); or, subjecting nonresident businesses to a higher tax rate than local businesses, *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389 (1952); or, by subjecting interstate commerce to the burden of "multiple taxation." *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939). In applying one or more of the above articulated principles, historically, this Court has defined the scope of the protection afforded by the Commerce Clause to include the actual movement of commerce itself across state lines,[18] taxes upon the privilege of engaging in various interstate activities,[19] situations in which local taxes were levied on re-

---

18. Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872); Coe v. Errol, 116 U.S. 517 (1886); Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926); and Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

19. *UPON BUSINESSES EXCLUSIVELY INTERSTATE*: Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); State Tax Comm'n. v. Interstate Natural Gas Co., 284 U.S. 41 (1931); Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951).

UPON BUSINESSES MIXING LOCAL AND INTERSTATE COMMERCE: Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Texas Transport & Terminal Co. v. New Orleans, 264 U.S. 150 (1924).

UPON THE OCCUPATION OF SELLING GOODS SHIPPED THROUGH INTERSTATE COMMERCE CHANNELS: Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887); Nippert v. City of Richmond, 327 U.S. 416 (1946); Heyman v. Hays, 236 U.S. 178 (1915); Rearick v. Pennsylvania, 203 U.S. 507 (1906); Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917).

ceipts derived from interstate transactions,[20] and, taxes levied on the means and instrumentalities of interstate commerce that were considered an integral part of that interstate commerce.[21]

Although the Court in fashioning commerce clause protection, has been concerned with protecting the right of access to state economies by interstate commerce and fostering the efficient allocation of the resources of our national economy,[22] it also has realized that "the power of taxation is indispensable to [the state's] existence." *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 199 (1824).

> "The recurring problem [for the Court has been] to resolve [the] conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the states' rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received."[23]

---

20. Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422 (1947); Freeman v. Hewitt, 329 U.S. 249 (1946); and Philadelphia & So. S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

21. Puget Sound Stevedoring Co. v. State Tax Comm'r., 302 U.S. 90 (1937); New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U.S. 338 (1930); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925); Helson v. Kentucky, 279 U.S. 245 (1929).

22. General Motors Corp. v. Washington, 377 U.S. 436, 460 (1964); (Goldberg, Stewart and White, JJ., dissenting); *See also*: *State Taxation of Multistate Businesses,* 74 YALE L. J. 1260, 1271 (1965).

23. In recent years, it appears that state tax collectors have had difficulty in keeping pace with state expenditures due to the various demands for additional govern-

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157, 166 (1954).

In attempting to accommodate between the revenue needs of the states and the competing national need for commercial freedom,[24] this Court has permitted states to tax interstate commerce or activities related thereto in basically two forms: (1) state taxes that are actually tolls exacted for the privilege of using state facilities;[25] and, (2) taxes on local activities deemed sufficiently removed from the interstate commerce itself.[26] Initially, it is the State's

---

mental services, coupled with the spiralling governmental costs due to inflation. *See*, Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051-52 (1960) and the U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, COMPENDIUM OF GOVERNMENT FINANCES (1967).

24. These two policy considerations hardly permit an absolutely logical or philosophical reconciliation but the dilemma apparently does permit the fashioning of a relatively practical, workable balance.

25. Tolls: *e.g.*, Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., —— U.S. ——; 92 S. Ct. 1349 (1972); Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950).

26. Local Activity: *e.g.*—

A. *SALES AND USE TAXES APPLIED TO ARTICLES USED IN INTERSTATE COMMERCE*

1. Local sales taxes:
   Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U.S. 147 (1932).

2. Storage and use taxes:
   (a) before interstate movement;
   Federal Compress & Warehouse v. McLean, 291 U.S. 17 (1934); *cf.*,

position that the tax presently challenged is a tax upon a substantially local activity of United that is lawfully imposed since it does not discriminate against interstate commerce.

The Supreme Court of Illinois assumed the following facts:

Chassaniol v. Greenwood, 291 U.S. 584 (1934); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923).

(b) after interstate movement;
Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934).

(c) break in transit;
Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249 (1933); Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939); Pacific Tel. & Tel. Co. v. Gallagher, 306 U.S. 182 (1939); Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947).

B. *USE TAX ON LOCAL PRIVILEGE OF USING GOODS AFTER INTERSTATE PURCHASE*

Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

C. *VARIOUS PRIVILEGE TAXES IMPOSED UPON FOREIGN CORPORATIONS UTILIZING LOCAL MARKETS*

1. Exercising a corporate franchise:
Maine v. Grand Trunk Ry., 142 U.S. 217 (1891).

2. Existing as a domestic corporation:
New York *ex rel.* Cornell Steamboat Co. v. Sohmer, 235 U.S. 549 (1915); Ashley

". . . United purchases and takes delivery of the aviation fuel in question from Shell Oil Company at facilities of the latter located in Hammond and East Chicago, Indiana. Thereafter, United transports it by common carrier pipeline and trucks to its underground storage facilities at O'Hare and Midway airports in Illinois. Fuel transported by pipeline is first

---

v. Ryan, 153 U.S. 436 (1894).

3. Manufacturing, production and extraction of Natural Resources:

   American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919) (manufacture of goods for sale); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) (mining); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) (removal of natural gas); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (generation of electrical power).

4. Sales and business transactions measured by gross receipts:

   McGoldrich v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); and its companion cases, McGoldrich v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940); Jagels, "A Fuel Corporation" v. Taylor, 309 U.S. 619 (1940); McGoldrich v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940) (transfer of possession to the purchaser); International Harvester Co. v. Dep't. of Treasury, 322 U.S. 340 (1944); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) (tax on occupation of publication of newspapers and magazines measured by gross receipts from the sale of advertising); Dep't. of of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941) (sale and delivery taxable event); International Harvester Co. v. Dep't. of Treasury, 322 U.S. 340

placed in storage tanks at Des Plaines, Illinois, and from there, as needed, is piped to the underground facilities. It remains in the latter only so long as necessary for certain purification processes, and from there is pumped into the tanks of United's aircraft, almost always immediately prior to departure time. United pays the tax on fuel used in intrastate flights, training flights and the like, and the dispute here relates only to fuel loaded on planes departing on interstate or foreign flights." (A. 194).

(1944) (various sales constituted local transaction serving as taxable event); *cf.* State Tax Comm'n. of Utah v. Pacific State Cast Iron Pipe Co,. 372 U.S. 605 (1963); International Harvester v. Evatt, 329 U.S. 416 (1947) (tax upon privilege of doing business within state measured by gross receipts from interstate sales of manufactured articles); Norton Co. v. Dep't. of Revenue, 340 U.S. 534 (1951) (tax on occupation of selling measured by gross receipts where the local office either received the order or distributed the goods); Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939) (annual franchise tax on corporations measured by allocation formula); General Motors Corp. v. Washington, 377 U.S. 436 (1964) (tax on privilege of engaging in business activities within the state measured by gross wholesale sales).

D. *"SUBSTANTIAL INCOME PRODUCING ACTIVITY" — SUPPORTING AN APPORTIONED STATE NET INCOME TAX*

Northwestern States Portland Cement Co. v. State of Minnesota, 358 U.S. 450 (1959).

In construing the issue, the Court stated:

"... Immediately after the enactment of the Use Tax Act in 1955, the Department of Revenue uniformly and consistently interpreted and applied the Act to these carriers in such a manner that the incidence and measure of the tax was taken to be only that portion of the fuel consumed in or over Illinois. This construction has been commonly referred to as the 'burn off' rule and, during the period of its application, provoked no amendatory legislation. Eight years later, on June 3, 1963, the Department abruptly changed its interpretation and issued a bulletin which announced:

'The Department's position is that temporary storage ends and a taxable use occurs when the fuel is taken out of storage and placed into the tanks of the airplanes, railroad engine or truck. At this point the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois.

'If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, then they no longer will be able to give a certificate to the vendor stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the Use Tax to their supplier.'

In short, under this construction all fuel loaded on United's planes at the two airports was deemed to measure the tax, and the exemption in question was construed as having application only if the temporarily stored fuel is transported out of the state for use elsewhere by some means other than placing it in equipment which would consume it."

* * *

"The Use Tax Act, which went into effect in August, 1955, (Laws of 1955, p. 2027), imposes a tax on the privilege of using in this State tangible personal property that was purchased elsewhere, and was de-

signed to complement the Retailers' Occupation Tax Act, (Laws of 1933, p. 924), under which a tax is imposed upon persons engaged in the business of selling tangible personal property to purchasers for use and consumption. It has been found to be constitutional (*Turner* v. *Wright*, 11 Ill. 2d 161), and it is settled that the Use Tax Act was enacted for the valid purposes of preventing evasion of retailers' occupation tax by persons making out-of-state purchases of tangible personal property for use in Illinois, and of protecting Illinois merchants against diversion of business. At issue here, a matter of first impression, is the construction and application of that portion of section 3 of the Act which, from its inception in 1955, has provided for an exemption from the tax in these terms: 'To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances: * * * (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State * * *.'" Ill. Rev. Stat. 1955, ch. 120, par. 439.3. (A. 193-95).

United submitted alternative arguments. Initially it suggested that the taxing statute should be construed to measure the tax solely by the amounts of fuel consumed by United's interstate flights in and over Illinois. In support thereof, it was postulated that the placing and presence of fuel in departing planes is but a continuation of temporary storage and that the burning of fuel in and over Illinois is simultaneous consumption terminating temporary storage. (A. 198). In the alternative, United insisted that the state legislature waived the right to tax either storage or withdrawal by enacting the temporary storage provision and that the present taxable incident

falls upon the loading of aircraft which is an integral activity of interstate commerce. (A. 201). The state contended that the taxable use occurs when United withdraws its fuel from storage and places it in its planes. (A. 201). The Supreme Court of Illinois upheld the tax, and as previously set out, did so upon the following rationale:

> "Our own statute defines a taxable 'use' as being 'the exercise by any person of any right or power over tangible personal property incident to the ownership of such property' (Ill. Rev. Stats. 1961 and 1969, ch. 120, par. 439.2)."

and:

> "In language which we find to be plain, simple and unambiguous, the Act has granted exemption to 'the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, *is used solely outside this State.*' (Emphasis added.) Exemption is thus granted only as to tangible personal property which is stored here temporarily and which, upon withdrawal from storage, is to be used solely outside Illinois. To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax. But United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is stored here only to facilitate United's operations from the O'Hare and Midway airports within the State. Under the circum-

> stances, the 'storage' becomes something more than a 'temporary storage' for safekeeping subsequent to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution." (A. 202).

On the basis of the above language, the taxable incident in this cause can reasonably be construed to be either storage and withdrawal; or storage, withdrawal from storage and conversion to ultimate use, both measured by the amount of gas that has been stored in Illinois and withdrawn to be loaded upon United's aircraft at O'Hare and Midway. Under either interpretation, the tax is valid.

Under the Use Tax Act, the Illinois legislature provides enterprises doing business in interstate commerce with an exemption which by its very nature is not available to solely intrastate concerns. The exemption merely establishes that the otherwise taxable use of storage and withdrawal of personal property acquired outside Illinois and brought within the state is not taxable in Illinois if one does not otherwise, other than storage and withdrawal, use the property stored in Illinois. However, if one does otherwise use the property stored and withdrawn in Illinois, the storage and withdrawal is no longer exempt but is a taxable use. Within this setting, the additional use, be it installation or consumption, that triggers the abolition of the exemption is not the taxable event nor the measure. However, even if the taxable event is interpreted to include storage, withdrawal from storage, and installation of the fuel that ultimately propels the aircraft, the principles enunciated by this Court validate the tax.[27]

---

27. United has argued that the imposition of the present use tax is against interstate commerce since it has

This Court has upheld state use taxes upon property within its borders at three different intervals—before the personal property starts its interstate movement,[28] after the movement ends,[29] and, in certain circumstances, dur-

been "denied the usual benefits of the temporary storage provision solely because the fuel in question is stored in Illinois to facilitate United's interstate operations." (App't. Br. p. 18). The conceptual emphasis of United's argument is misplaced. "Catchwords and labels, such as the words [interstate commerce] are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." Henneford v. Silas Mason Co., 300 U.S. 577, 586 (1936). The temporary storage exemption was enacted for the benefit of those enterprises who acquire tangible personal property outside the state and who store these goods in Illinois and subject these goods to no other uses within Illinois. The operation of the abolition of the exemption falls equally upon those doing intrastate and interstate business. In effect, beginning in June of 1963, the state began imposing a use tax upon the full measure of fuel stored and withdrawn by United within Illinois. Previously, the State could have lawfully taxed the fuel but had not seen fit to do so. As this Court has stated:

> "A taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power." *Id.* at p. 587.

28. Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17 (1934); Coe v. Errol, 116 U.S. 517 (1885); Diamond Match Co. v. Village of Ontonagon, 188 U.S. 82 (1903).

29. Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934); Woodruff and Parker v. Parkham, 75 U.S. (8 Wall.) 123 (1869); *cf.* Pittsburgh & Southern Coal Co. v. Bates, 156 U.S. 577 (1891).

ing a break in the interstate movement.[30] On several occasions, this Court has had the opportunity to examine the situation in which hard goods or fuels have been transported interstate, then stored by the taxpayer in the taxing state while awaiting further use or consumption.

In *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* 288 U.S. 249 (1933), Tennessee levied a "privilege tax" upon the storage of gasoline within the state and its withdrawal from storage for use or sale. The taxpayer was an interstate rail carrier purchasing large quantities of gasoline outside Tennessee and transporting it into the state in tank cars, from which it unloaded and placed the fuel in storage tanks. All of the fuel was withdrawn and

---

30. Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947); General Oil Co. v. Crain, 209 U.S. 211 (1907); Bacon v. Illinois, 227 U.S. 504 (1912). Justice Hughes in Minnesota v. Blasius, 290 U.S. 1, 9-10 (1933), concluded that property which has come to rest within a state and is being held at the pleasure of the owner, for disposal or use, as his interest dictates, is part of the general mass of property within the state and is subject to the state's taxing power. However, the Court did note that if the interstate movement had begun, it may be regarded as continuing, despite temporary interruptions due to the "necessities of the journey or for the purpose of safety and convenience in the cause of movement." The concepts of "the pleasure of the owner" and "necessities of the journey or for the purpose of safety and convenience" are not mutually exclusive. And the fact that a particular break in transit provides safety and convenience should not preclude the conclusion that the goods are held for business reasons at the pleasure of the owner that secures some "independent local advantage". Compare the Court's division on the purpose of stoppage in Independent Warehouses, Inc. v. Scheele, *supra,* with General Oil Co. v. Crain, *supra.*

used by it as a source of motive power in interstate railway operations. The taxpayer challenged the imposition of the tax on the basis that it was imposed on the gasoline while still a subject of interstate commerce, and also, on the basis that in effect it was a tax upon the use of gasoline in appellant's business. In upholding the tax, Justice Stone concluded:

> "The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. See Bromley v. McCaughn, 280 U.S. 124, 136-138, 74 L. ed. 226, 229, 230, 50 S. Ct. 46. Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson v. Kentucky, 279 U.S. 245, 73 L. ed. 683, 49 S. Ct 279, supra. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. See Eastern Air Transport v. Tax Commission, 285 U.S. 147, 76 L. ed. 673, 52 S. Ct. 340.
>
> Appellant objects that the tax violates the Fourteenth Amendment in that it is levied as a charge for the use of the highways which appellant does not use. But the levy is a tax, not a toll or charge for use of the highways, see Carley & Hamilton v. Snook, 281 U.S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194, and the constitutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by

taxation. Carley & Hamilton v. Snook, supra; St. Louis & S. W. R. Co. v. Nattin, 277 U.S. 157, 159, 72 L. ed. 830, 831, 48 S. Ct. 438." *Id.* at 268-69.

In *Edelman* v. *Boeing Air Transport*, 289 U.S. 247 (1933), Wyoming imposed a "license tax" upon the use of gasoline within the state. The taxpayer maintained an air service for the transportation of passengers, mail and express in interstate commerce. It purchased gasoline both within and without the state which it intermingled and stored in tanks at the two airports. The taxpayer contended that the state could not validly apply the use tax to the gasoline imported from outside the state, stored in tanks at the airport and used for "filling" the interstate planes in which it was eventually consumed. The tax was applied to the stored gasoline as it was withdrawn from the storage tanks at the airport and placed in the planes. The Court upheld the tax upon the theory that a state may validly tax the use to which gasoline is put in withdrawing it from storage within the state and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. *Id.* at 252. *Accord, American Airways, Inc.* v. *Wallace*, 287 U.S. 565 (1932); *American Airways, Inc.* v. *Grosjean*, 3 F. Supp. 995 (E.D. La. 1933).

In *Wallace*, the statute was labelled a storage and withdrawal tax. In *Edelman*, the language used by the state court was that of a use tax. Both statutes appeared to be of the same nature and designed to reach the same event. The use tax coupled together with a storage tax in the same California statute was upheld in two subsequent cases.

In *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167 (1939), California applied a storage and use tax upon railroad

equipment and supplies purchased outside and brought into the taxing state for use in the operation of an interstate railroad. Few, if any, of the supplies were stored for long term needs. And, to avoid delay and cost, the movement from loading to final placement was as nearly continuous as managerial efficiency could contrive. All purchases were dedicated to the consumption in the taxpayer's interstate transportation business. Despite the former, this Court found a permissible taxable event when the articles "had reached the end of their interstate transportation and had not begun to be consumed in interstate operation." During this break "[a]t that moment, the tax on storage and use — retention and exercise of a right of ownership, respectively — was effective." In addition, the court noted that " 'practical continuity' does not always make an act a part of interstate commerce." *Id.* at 177.

In *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U.S. 182 (1939), the taxpayer operated a telephone and telegraph system in interstate and intrastate commerce. It purchased outside California substantial quantities of equipment, apparatus, material and supplies that were shipped to it in interstate commerce at various points within the state. The articles were stored pending use for installation and repairs of the communications system. This Court upheld the imposition of the California storage and use tax upon the taxpayer by concluding:

> "The appellant exercises two rights of ownership in California — retention and installation — after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system." *Id.* at 187.

In the present case, the state court premised its decision upon the fact that United purchases and takes delivery of the aviation fuel in question in Indiana. Thereafter, United

transports the aviation gas going to O'Hare and the aviation gas and turbine fuel going to Midway by common carrier trucks to its underground storage facilities at O'Hare and Midway airports in Illinois. Turbine fuel designed for O'Hare is first piped to storage tanks at Des Plaines, Illinois, and from there, is piped to United's underground facilities at O'Hare. The stored fuel is subject to no further refining or processing except for the process of filtering necessitated by the common carrier transfer from Indiana. (A. 194). The fuel is stored on the average of two-and-one-half to six days. (A. 38). United not only holds this fuel at its own pleasure, it leases the Des Plaines storage area to further its own business advantage. (R. 371-74). The fuel is removed from storage and placed on aircraft for the purpose of its ultimate consumption in supplying motive power for interstate transportation. On the basis of these facts, whether United's taxable event is construed to be storage and withdrawal, or storage, withdrawal from storage, and conversion to ultimate use (installation), measured[31] by the amount of fuel that has been stored

---

31. It is well established that if a tax is imposed upon a subject within the permissible taxing power of the state, it will not be condemned because of the measure. This Court has stated that the "validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount." Home Ins. Co. v. New York, 134 U.S. 594, 600 (1890). However, on several occasions, this Court has used language that indicates that the state designated measure was an infringement of the commerce clause. New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U.S. 338 (1930); Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939). Whether the Court treated the alleged measure of the tax as really the operating incident or merely invalidated the

in Illinois and withdrawn to be loaded upon United's aircraft in Illinois, the cases of *Nashville* (storage and withdrawal), *Edelman* (withdrawal from storage), *Southern Pacific Co.* (storage and use), and *Pacific Telephone* (retention and installation) support its validity.

B.

The Imposition Of The Illinois Use Tax Upon United's Local Activities Of Storage And Withdrawal, Or Storage, Withdrawal From Storage And Installation, Does Not Discriminate Against Interstate Commerce Either By (1) Imposing The Tax Solely Upon Interstate Enterprises, Or (2) Levying The Tax Upon Interstate Commerce At A Higher Rate, Or (3) Subjecting Interstate Commerce To The Danger Of "Multiple Tax Burdens".

In *Henneford* v. *Silas Mason Company,* 300 U.S. 557 (1936), a contractor engaged in the construction of the Grand Coulee Dam purchased supplies at retail in other states and brought them into the state of Washington to be used there in its construction project at the dam. After the property had come to rest, Washington imposed a tax upon the use[32] of these chattels in that state. The

---

latter taxes because of the specific measure chosen is irrelevant here, since the Illinois measure accurately reflects the local incident taxed.

32. Apparently, the fact that the effect of a "compensating use tax" is to aid instate retail sellers "to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden," and, that the tax helps to "avoid the likelihood of a drain upon the revenue of the state" does not vitiate an otherwise valid tax. Henneford v. Silas Mason Co., *supra,* at 581.

Silas Mason Company challenged the imposition of the tax as a violation of the Commerce Clause. Speaking through Justice Cardozo, this Court upheld the tax. The Court concluded that the incidence of the tax was not upon the operation of interstate commerce but upon the privilege of use after commerce was at its end. By way of analysis Justice Cardozo explained that tangible property transported in interstate commerce may be subject to a non-discriminatory property tax when it has become part of the common mass of property within the state of designation. In addition the Court noted that the privilege of use was only one attribute, among many, of the bundle of privileges that constitute property or ownership — and, a state is at liberty, if it desires, "to tax them all collectively, or to separate the faggots and lay the charge distributively." *Id.* at 582. Labeling the Washington use tax an excise when its effect was solely upon the use of property did not, thought the Court, make the power to impose it less.

Although the Washington compensating use tax was similar in effect to the general use and storage and withdrawal taxes, the Court paid particular attention to the possible discriminatory aspects of the compensating use tax. However, upon clear scrutiny, the Court concluded that Washington use tax did not discriminate against interstate commerce.

The Court considered the following facts pertinent. The Washington sales and use taxes were imposed at the same rate. The use tax was imposed at the same rate upon in-state or extra-state purchases being used in the state. Neither in-state nor extra-state purchasers using property within the state need pay the use tax if the "use of any article of tangible personal property, the sale or use of which has already been subjected to a tax equal to or

in excess of that imposed by this title, whether under the laws of this state or of some other state . . ." In other words, no one who was using property in Washington after buying it at retail was to escape tax upon the privilege of enjoyment except to the extent that he had paid a use or sales tax somewhere, but everyone who had paid a sales or use tax anywhere on the same goods, to that extent, was exempt from the payment of the use tax in the state of Washington. In consequence, Justice Cardozo summarized:

> "Equality is the theme that runs through all sections of the statute . . . when the account is made up, the stranger from afar is subject to no greater burden as a consequence of ownership than the dweller within the gates." *Id.* at 583-84.

The imposition of the present Illinois use tax upon the storage and withdrawal of fuel by United does not discriminate against interstate commerce since it neither (1) imposes the tax solely upon interstate commerce, nor (2) imposes a higher rate of tax upon interstate commerce, nor (3) subjects interstate commerce to a "multiple tax burden."

In construing the Use Tax Act subject to a state challenge to its constitutionality, the Supreme Court of Illinois explained:

> "The Use Tax Act was enacted in 1955. It imposes a tax 'upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer.' (Section 3.) It applies whether the property is purchased in Illinois or elsewhere. The term 'use' is defined basically to mean the exercise 'of any right or power over tangible personal property incident to the ownership of that property.' (Section 2.) The use tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act, (Section 3;

cf. Ill. Rev. Stat. 1955, chap. 120, par. 441.) It does not apply to out-of-State transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sale or use tax has been paid to another State, to the extent of the tax so paid. (Section 3.) The tax is to be collected by the retailer, but to the extent that a retailer remits the tax imposed by the Retailers' Occupation Tax Act, he is not required to remit the tax imposed by the Use Tax Act. (Section 9.) An out-of-State retailer may be licensed by the Department of Revenue to collect and remit the tax. (Section 6.) One who purchases from an out-of-State retailer who is not so licensed is required to pay the tax directly to the Department. (Section 10.) The act incorporates by reference many of the administrative provisions of the Retailers' Occupation Tax Act. (Section 12.)"

Turner v. *Wright*, 11 Ill. 2d 163-64, 142 N.E. 2d 84, *appeal dismissed*, 355 U.S. 65 (1957).

In summary, the Court concluded:

"The statute provides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one tax of [4%] per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex

> than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.
>
> It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the retailer does not constitute a debt owed by him to the State when he 'is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction.' (Section 8.)"[33] *Id.* at 167-68.

As can be seen by the above-quoted opinion, the Illinois use tax neither imposes the tax solely upon interstate commerce nor levies a higher rate upon that commerce. The issue that remains is whether the effect of the present tax imposes a multiple tax burden upon interstate commerce not borne by local uses.

The record clearly establishes that United by contractual obligation pays to Shell Oil Company an annual dollar amount that equals what Shell would pay to the State of Indiana if the purchase price of the sale of fuel to United was included in the gross receipts measuring the Indiana gross income tax. (A. 41, 101-02, 183; R. 153-56, 407). However, nowhere in the record is there any indication

---

33. The Retailer's Occupation Tax Act and the Use Tax Act have, in relevant part, not substantially changed since the Turner opinion—*See*, Ill. Rev. Stat., 1963-1971, Ch. 120, §§439.1 et seq. and 440 et seq.

that Shell *in fact* pays any Indiana gross income tax that reflects a percentage of the receipts from the sale of fuel by Shell to United that is ultimately stored and withdrawn in Illinois. The fact that Shell contractually requires United to pay the analogous figure is irrelevant to the multiple state taxation issue here.[34] Notwithstanding the above, if, in fact, Shell does pay to Indiana an Indiana gross income tax that reflects the fuel subject to this litigation measured by its sale price, apparently Shell does so in spite of an Indiana Tax Regulation that would exempt it. The regulation states:

> "Income is not taxable if it is derived from sales of goods which are picked up in Indiana by a common carrier, which was ordered to do so by the out-of-state purchaser, and delivered to an out-of-state destination."
>
> Rule 1, Instruction 11-8, Ch. 11, Part A, INDIANA GROSS INCOME TAX REGULATIONS OF 1956. *See also, Gross Income Tax Division* v. *L. S. Ayres,* 233 Ind. 194, 118 N.E. 2d 480, 483 (1954).

However, even if it were true that Indiana requires Shell to pay an Indiana gross income tax that reflects a percentage of the receipts from the sale of fuel by Shell to United that is also subject to the present litigation, and Shell shifts the burden to United by contract, there still

---

34. This Court has made it clear that one "claiming immunity from a tax has the burden of establishing his exemption." General Motors Corp. v. Washington, 377 U.S. 436, 441 (1964). In addition, it has been stated that ". . . the appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it." Interstate Busses Corp. v. Blodgett, 276 U.S. 245, 251 (1927).

is no danger of multiple taxation.[35] Ill. Rev. Stat. 1963-1971, § 439.3 (unnumbered para. 6, subsection (c)) states that the Illinois use tax shall not apply to the use of tangible personal property in this State if

> "(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state; . . ."

United has not indicated that either it merits the above exemption, or, that if it in fact qualified for it, it has requested a set-off from the Illinois Department of Revenue for the tax paid to Indiana and has been denied the same. Within the immediate context, until United has shown that it qualified for the exemption and has been denied the same, argument concerning multiple taxation is pre-

---

35. The "multiple burdens" doctrine articulated by Justice Stone in Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) was founded upon the dual principles that (1) interstate commerce should bear its fair share of state tax burdens; however, (2) state taxes affecting interstate commerce should be sustained when not involving the *risk* of "cumulative burdens not imposed on local commerce", *Id.* at 255-56. *Accord,* Freeman v. Hewitt, 329 U.S. 249, 279 (1946) (concurring opinion, Rutledge, J.). However, in Northwestern States Portland Cement Co. v. State of Minnesota, 358 U.S. 450, 463 (1959) this Court appeared to be satisfied if there was no actual tax duplication. *Accord,* General Motors Corp. v. Washington, 377 U.S. 436, 449 (1964). Whether the "multiple burdens" test requires risk or actual tax duplication, the imposition of the present Illinois use tax upon United is valid—construing the term "risk" to mean that which might reasonably be anticipated to occur.

mature. Obviously, application of the above set-off provision would prevent the extra-state purchaser, who has paid a previous use or sales tax, from carrying an economic weight disproportionate to the local user. From the above, it is clear that United has not shown with any degree of clarity that the imposition of the Illinois use tax upon the storage and withdrawal from storage of the fuel in question subjects it to tax duplication not borne by local taxpayers.[36]

---

36. When this Court originally evolved the "multiple burdens" doctrine, that doctrine appeared to be fashioned to reach state taxes that took within their ambit receipts of the taxpayer flowing from extra-state activities. *Compare,* Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938), *with* Adams Mfg. Co. v. Storen, 304 U.S. 307 (1948), Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Dept. of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941), and McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 57 (1940). However, in Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422 (1947) and Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) the Court struck down state taxes because of its concern with the possibility that if it upheld the tax several states could tax a complementary activity related to the flow of goods in interstate commerce (*i.e.,* loading and unloading of cargo and the taking and withdrawing of gas in pipelines). The latter concept with its emphasis upon the flow of articles in interstate commerce, if given too broad a scope, would greatly interfere with the ability of states to require interstate commerce to bear its fair share of local tax burdens. However, the Joseph application of the "multiple burdens" test acquires validity if a single taxpayer, dealing with the same article, is subject to taxation by several states on complementary interstate transactions. However, as evident above, United has not shown that it is being taxed upon the singular transaction of transferring property by both a sales and use tax.

II.

SINCE THE FACTS REVEAL THAT THE PURCHASE OF THE AVIATION FUEL IN QUESTION BY UNITED AIRLINES FROM SHELL OIL COMPANY IS BASICALLY AN ILLINOIS SALE TO AN ILLINOIS BUYER THAT WOULD SUPPORT A SALES TAX UPON THE PURCHASER, THE IMPOSITION OF THE PRESENT NON-DISCRIMINATORY USE TAX UPON UNITED (PURCHASER) IS VALID.

> "Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does [United], and take advantage of its gain on domesticity, and still maintain that same degree of immunity."
>
> *General Motors Corp.* v. *Washington,* 377 U.S. 436, 448 (1964).

United Airlines not only maintains its principal place of business in Illinois, but Chicago is the hub of its interstate air operations. (A. 2, 56-57; R. 039, 33). Pursuant to a general requirements contract, from Chicago United sends its orders for the aviation fuel subject to this litigation to Shell in East Chicago, Indiana. (A. 129-30; R. 213-14). Ultimately, all the aviation fuel that United receives from Shell and stores at either O'Hare or Midway Airports is first transported by Shell from Shell's refinery in Wood River, Illinois, to Shell's storage facilities in East Chicago, Indiana. (A. 147-49, 153-57; R. 268-69, 274-75, 289-90, 292, 297-98, 300-01). During the interim, the fuel stops in East Chicago, Indiana for approximately 10 days. (A. 137-38; R. 231). Of all the fuel in East Chicago, Indiana, from Wood River, Illinois, about 12% is shipped to states

other than Illinois, but the balance goes to United and American Airlines at either O'Hare or Midway airport. (A. 154; R. 290). The turbine fuel destined for O'Hare is shipped via a common carrier pipeline of which Shell owns 20%. Then the fuel is stored at Des Plaines, Illinois, in storage facilities owned by Shell and leased by United and American — facilities which, by contract, shall contain only Shell products unless otherwise agreed by Shell. (A. 130-36, 140, 147; R. 216-17, 218-25, 243, 265). The turbine fuel is then shipped to O'Hare through pipelines owned by Shell. (A. 142-43; R. 246-48). By contract[37] between Shell and United, United takes delivery and title of the aviation fuel in East Chicago, Indiana, (A. 38; R. 104). However, Shell admitted that it was physically possible to deliver the turbine fuel directly to O'Hare Airport. (A. 146; R. 258-60). United sends its payment for the fuel from its office in Des Plaines, Illinois, to Shell at Indianapolis, Indiana. (A. 182; R. 369). It was not established where the general requirements contract was made.

---

37. Generally, the law of sales has not been looked upon by this Court as determinative of the validity of taxes when applied to sales. *Compare* East Ohio Gas Co. v. Tax Comm'n., 283 U.S. 465 (1931); Rearick v. Pennsylvania, 203 U.S. 507, 512 (1906); *cf.* Superior Oil Co. v. Mississippi *ex rel.* Knox, 280 U.S. 390 (1930) *with* McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944). This Court has on several occasions emphasized that it is concerned with the substance of the taxable event not with the labels characterizing it. International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435 (1944); Wisconsin v. J. C. Penny Co., 311 U.S. 435 (1940); Railway Express Agency Inc. v. Virginia, 347 U.S. 359 (1954).

From the above, the impact of the delineated facts[38] indicates that both Shell and United have established significant contacts with the State of Illinois to support the imposition by the state of a sales tax upon United. Surely, if the state can impose a sales tax on United for its purchases of fuel from Shell, the state should be able to impose a non-discriminatory use tax.[39]

In *McGoldrich* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33 (1940), New York City applied a sales tax to the sales of coal by a foreign corporation doing business in New York to local customers pursuant to contracts made in New York but calling for shipment and delivery direct from mines in Pennsylvania. The tax was fixed at "2% of the receipts from every sale in the city . . ." and sale being defined as "any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor." *Id.* at 42. The statute required that the tax be paid by the purchaser, and upon analysis, the Court concluded that the ultimate

---

38. In the instant case, the examination of the whole record is helpful in grasping the total perspective of the contacts. *See,* General Motors Corp. v. Washington, 377 U.S. 436, 441-42 (1964). Also, in Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1947) the Court went beyond a stipulation of facts at the trial court to uphold the state taxation.

39. *Compare,* McGoldrich v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940), *with* McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944). McLeod would seem to provide parties with the opportunity by contractual manipulation to convert what would otherwise be an exclusively local activity into an interstate transaction so that they could enjoy whatever tax immunity the appearance of doing interstate commerce can confer.

burden of the tax, both in form and substance, was laid upon the buyer for the consumption of tangible personal property measured by the sales price. *Id.* at 43. Justice Stone, speaking for the majority, sustained the state tax supported by the following rationale:

> "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power."
>
> * * * *
>
> "It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce . . . [cases cited] . . ., or a property tax on goods by the state of destination at the conclusion of their interstate journey." *Id.* at 58, 59.

During the same term of the Court as *Berwind-White,* and on the authority of *Berwind-White,* the imposition of the New York City sales tax was upheld in three companion cases: *McGoldrich* v. *Compagnie Generale Transatlantique,* 309 U.S. 430 (1940); *Jagels, "A Fuel Corporation"* v. *Taylor,* 280 N.Y. 766, 21 N.E. 2d 526 (1939), *aff'd. per curiam,* 309 U.S. 619 (1940); and *McGoldrich* v. *Felt & Tarrant Mfg. Co.,* 309 U.S. 70 (1940). In *Compagnie* and *Jagels,* the corporate and other relevant facts were essen-

tially like those in *Berwind-White,* except in *Jagels,* the sales contracts were concluded outside the taxing city. In *Felt & Tarrant,* the taxpayer had no place of business in New York City and accepted the orders outside the city. The goods were then shipped into the taxing city, f.o.b. the place of shipment. Upon the basis that the "transfer of possession" took place in the taxing jurisdiction, the Court sustained the tax. *See also, Department of Treasury* v. *Wood Preserving Corp.,* 313 U.S. 62 (1941).

In *International Harvester Co.* v. *Department of Treasury,* 322 U.S. 340 (1944), the Court had before it three different types of sales transactions to which Indiana had applied its gross income tax measured by gross receipts. In class "C", Indiana buyers purchased from branches of the seller-taxpayer outside Indiana. The contracts of sale were entered into outside Indiana but the delivery occurred within Indiana. In class "D", buyers outside Indiana purchased from branches within Indiana, and the contracts were entered into in Indiana. Delivery occurred at the factory of the seller-taxpayer in Indiana. In class "E", Indiana buyers made purchases from Indiana branches where the contracts were made, but the articles were shipped by the taxpayer from its factories outside the state to the buyers in Indiana. The Court held that the Indiana gross income tax measured by the gross receipts could be applied to all three classes of sales without violating either the Commerce Clause as set forth in Article I, Section 8, clause 3 of the United States Constitution or the due process clause of the Fourteenth Amendment. In all three types of sales, this Court found local transactions which served as lawful taxable events apart from interstate commerce. Because substantial activity occurred in Indiana and the tax did not purport to reach proceeds from extra-state activities which had no connection with

the taxing state, the entire proceeds of the transaction were attributable to the taxing state. *Id.* at 343, 346. The reasoning of the Court in sustaining the class "C" sales is particularly applicable:

> "We see no difference between the sales in the Wood Preserving Corp. case and the Class C sales in the present one which is translatable into a difference in Indiana's power to tax. The fact that the sales in Class C are made by an out-of-state seller and that the contracts were made outside the State is not controlling. Here, as in the Wood Preserving Corp. case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the State, the goods were neither just completing nor just starting an interstate journey. It could hardly be maintained that Indiana could not impose a sales tax or a use tax on these transactions. But, as we shall see, if that is the case, there is no constitutional objection to the imposition of a gross receipts tax by the State of thebuyer." *Id.* at 344-45.

In the present case, there is a sale of fuel refined and stored in Illinois for sale to an Illinois purchaser. The fact that the physical transportation of the fuel temporarily involves Indiana should not distort an otherwise local sale. *See, Department of Treasury of Indiana* v. *Ingram-Richardson Mfg. Co.,* 313 U.S. 252 (1941),[40] and *Eastern Air Transport*

---

40. In Ingram-Richardson Mfg. Co., the Court sustained an Indiana gross income tax as applied to receipts of the company enameling stone parts brought into Indiana for that purpose and immediately shipped out again following the enameling operation. The Court found a

v. *South Carolina Tax Commission*, 285 U.S. 147 (1932). Surely, if Illinois can impose a sales tax upon United under the present facts, the state should be able to levy a use tax; especially when the risk of tax duplication, defined in its broadest sense, is not possible because of the present status of both Illinois and Indiana law.[41] *See*, Argument I-B.

---

taxable local event wholly attributable to the taxing state even though interstate commerce was necessary for the performance of the enameling operation.

41. Even if one assumes that Indiana taxed Shell for the sale of the present fuel and Illinois had no use tax exemption for the payment of the out-of-state sales tax, presumably there still would be no multiple tax burden. International Harvester Co. v. Evatt, 329 U.S. 416 (1947), involved a state tax for the privilege of doing business of a multi-state enterprise measured by gross receipts from interstate sales of the manufactured goods. The complaining taxpayer argued that its tax, although apportioned, would be subject to the danger of tax multiplication by other states. The Court answered that, since "[the tax] is assessed only against the privilege of doing local Ohio business of manufacturing and selling, we do not come to the question, argued by appellant, of possible multiplication of this tax by reason of its imposition by other states. None of them can tax the privilege of operating factories and sales agencies in Ohio." *Id.* at 423. No other state can lawfully tax the privilege of storage and withdrawal of fuel in Illinois.

However, in its anlysis of state sales and use taxes, the Report of the Special Subcommittee on State Taxation noted:

> "Although not unanimous, there is widespread agreement that the multiple imposition of both sales and use taxes on the same transaction is unjustifiable. And indeed almost all States have one provision or

another to avoid overtaxation of this kind; however, not all of these provisions are adequate. Two possible devises for eliminating the multiple imposition of sales and use taxes are: (1) requiring that the tax be imposed only at the place of first use and (2) a credit for taxes previously paid.

A rule that the tax be imposed at the place of first use or not at all raises a number of difficulties. First, there is the problem of developing a standard, applicable with reasonable certainty, as to what constitutes first use. Second, in those cases where multiple taxation may most easily arise—cases of mobile personal property—there is the specter that limiting the tax to the place of first use would make it possible for a buyer deliberately to put each piece of equipment into use in a free State or a low-rate State. To attempt to deal with avoidance of this kind by proration would serve to complicate a tax which has a rare element of simplicity in its one-time application.

The credit also presents difficulties. First, it gives primacy to the State of origin, even though the tax is a market-oriented levy. Thus, while the State of origin receives its tax in full, a State subsequently imposing the tax must reduce its tax by the amount paid the origin State. Second, with the credit device the user of mobile property may have to pay additional increments of tax to each succeeding State until the peak rate has been met. From a compliance point of view this means that each piece of equipment must be tagged with the aggregate tax paid to date. The credit rule might, therefore, incline users of mobile property to send into high—rate States only equipment already fully taxed.

Despite the technically rough operation of a credit, it appears to offer decided practical advantages over the more refined first-use concept. It is

CONCLUSION

The appellees ask that the judgment of the Supreme Court of Illinois in this cause be affirmed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Room 900,
Chicago, Illinois 60601 (793-3500),
Attorney for Appellees.

WARREN K. SMOOT,
CALVIN C. CAMBELL,
Assistant Attorneys General,
130 North Wells Street, Room 1700,
Chicago, Illinils 60606 (793-2564),
Of Counsel.

---

easy to understand, clear in its application, and does not lend itself to tax avoidance. Perhaps most important, it provides direct relief to the owner from whom tax is demanded as to property which had already been subjected to tax."

SPECIAL SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE HOUSE COMMITTEE ON THE JUDICIARY REPORT ON STATE TAXATION OF INTERSTATE COMMERCE, H. R. No. 565, 89th Cong., 1st Session, Vol. 3, Ch. 28, pp. 893-94 (1965).